NTSB Order No.
EM-32

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.,

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 26th day of December 1973.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

LOUIS RICHARD KEATING

Docket ME-33

OPINION AND ORDER

The appellant, Louis Richard Keating, has appealed from the decision of the Commandant affirming the revocation of his seaman's documents for misconduct relating to his maritime employment. He was the holder of a merchant mariner's document (No. Z-1208067) at the time and employed thereunder as a fireman/watertender for a foreign voyage aboard the SS OVERSEAS EXPLORER, a merchant vessel of the United States.[1]

Appellant's prior appeal to the Commandant (Appeal No. 1932) was from the initial decision of Administrative Law Judge Archie R. Boggs, rendered after a full evidentiary hearing.[2] Throughout these proceedings, appellant has been represented by his own counsel.

The sanction is predicated on findings that on July 15, 1970, when the vessel was docked in the port of Haifa, Israel, appellant assaulted the chief mate, who was on the adjacent dock area, from behind by swinging a 3-foot piece of steel rod at his head and, in the same action, assaulted and battered the radio officer with the same rod, injuring the radio officer's right arm as he intercepted the blow aimed at the chief mate.

---

[1]The appeal to this Board from the Commandant's revocation action is authorized under 49 U.S.C. 1654(b)(2) and is governed by rules of procedure set forth in 14 CFR 425.

[2]Copies of the decisions of the Commandant and the law judge (then acting as "hearing examiner") are attached hereto. See, 5 CFR 930, 37 Fed. Reg. 16787, August 19, 1972.

Eyewitness testimony from the radio officer and the third mate was elicited at the hearing. Their written statements concerning the incident were also introduced, together with the chief mate's statement and a logbook entry recording his report to the master of appellant's threatened attack on him and appellant's reply thereto of "Nothing to say."[3] Appellant offered no rebuttal evidence. His only witness, a messman, was not at the scene and simply testified that from his subsequent observations in the messhall, the radio officer appeared to be uninjured and made no complaints to him of being injured.

The prior statements, signed by the three officers aboard ship on July 18, 1970, were admitted by the law judge, over objection, as attachments to the master's subsequent logbook entry on August 12, 1970. The law judge, moreover, elected to support his evidentiary findings by a recitation of these statements in lieu of the testimony of the two officers who appeared as witnesses.

In his brief on appeal, appellant contends that this type of decision, made in reliance upon unsworn statements, "places higher credence on hearsay evidence over that presented [under oath] in contradictory fashion." More specifically, he argues that discrepancies between the statements and the witnesses' testimony destroyed their credibility, that their testimony alone failed to establish that there was an assault on the chief mate, that any use of that officer's statement was improper, that his failure to appear as a prosecuting witness should have been construed in appellant's favor, that an assault was not proved with respect to the radio officer, and, finally, that "in the absence of any assault upon the radio officer, the charge of battery upon the radio officer should also be systematically dismissed." Counsel for the Commandant has filed a reply brief arguing, inter alia, that neither of the witnesses was challenged on the basis of their prior statements, that these statements contain "no major discrepancies" with their testimony, that attachment of the chief mate's statement to the log was "purely fortuitous" but properly

---

[3]Based on offenses recorded in a second logbook entry of June 15, 1970, the law judge made further findings that appellant was absent without leave and failed to perform his assigned watch on that date. The Commandant adopted the latter finding while dismissing the former as an offense merged therein. There is no question that this entry was made in compliance with legal requirements (46 U.S.C. 702) and we also find that appellant failed to meet the consequent burden of producing contrary evidence. Kellar v. United States, 273 F. Supp. 945, 947 (E.D. Va., 1967). Nevertheless, these are minor infractions in our view, which were properly disregarded by the law judge in assessing sanction.

considered as part of the record, and that the record as a whole supports the findings.[4]

Upon consideration of the parties' briefs and the entire record, the Board has concluded that the factual findings of the administrative law judge and those recited in narrative form by the commandant are supported by reliable, probative, and substantial evidence. We adopt those findings as our own, primarily on the basis of sworn testimony and as otherwise modified herein. Moreover, we agree that the revocation order, imposed pursuant to 46 U.S.C. 239(g) and applicable Coast Guard regulations issued thereunder,[5] is warranted in this case.

The testimonial evidence upon which we are relying is uncontroverted on the record. It appears therefrom that appellant and the chief steward had returned in a taxi from a Haifa barroom during the late afternoon of the date in question and that, after arriving at the dock, the steward collapsed as a result of extreme intoxication. This was reported to the three officers on the vessel, and the chief mate proceeded immediately to the dock, accompanied by the third mate, where they found the steward "laying on a stretcher ... unconscious ... his color was changing ... he had swallowed his tongue, "and was frothing at the mouth (Tr. 38, 54, 62,). The radio officer arrived at the scene approximately 5 minutes later (Tr. 39).

The third mate testified that he was on one side of the prone figure, "trying to get the steward's tongue out, "while the chief mate was "trying to take his pulse" on the opposite side. Appellant stationed himself on the same side as the chief mate, "talking and hollering" and using his body to interfere until the chief mate shoved him away (Tr. 55, 63-65). Thereafter, both mates concentrated on their efforts to revive the steward and neither of them was aware of appellant's ensuing actions until the rod was heard striking the dock behind them (Tr. 56, 70).

---

[4]Appellant has filed an additional brief, unauthorized under the Board's regulations, with seeks to rebut the Commandant's arguments. 14 CFR 425.20. This contains repetition and reargument of his original contentions for the most part, together with the belated assertion that the Coast Guard has acted in the dual role of prosecutor and judge in this case. The fact that one agency performs both functions is not proscribed so long as the separation of functions is preserved among the responsible personnel. 5 U.S.C. 554. Lacking any contrary showing, this late-filed assertion is rejected.

[5]46 CFR 137.03-5(a),(b),(1); 137.20-165, Group F.

The radio officer testified that as he approached this group from the rear, he observed that the chief mate was kneeling down, bending over the steward, and that appellant was not more than 3 feet behind him. Appellant was holding one end of the steel rod, to which a nut was attached at the opposite end,[6] and he was beginning to swing, "as one would swing a baseball bat, "at the chief mate.[7] To the radio officer it appeared that the rod "would have capped the chief mate, crashed the back of his skull." and he "immediately stepped in" to intercept the blow, which struck him between the right shoulder and elbow. The rod glanced off the radio officer and hit the ground. Appellant thereafter continued to swing the rod and threatened to kill the chief mate while being subdued by the radio officer with assistance from several foreign seamen. When appellant finally returned to his quarters aboard ship, he was still uttering threats to kill the chief mate (Tr. 35-36, 46-47, 50). The injury sustained by the radio officer was sufficient at the time to break the skin. It also caused swelling and discoloration the following day and required medical attention 2 months later because of "constrictions of the arm" (Tr. 40, 47, 58).

An assault is defined as an unlawful attempt, coupled with the present ability, to inflict violent injury on the person of another. The greater offense of assault with a dangerous weapon is committed if the attempt is perpetrated by means of an instrument likely to produce serious bodily harm. Here we find that the undisputed facts testified to by the ship's officers established the material elements for the latter offense[8] and appellant's

---

[6]The rod itself was placed in evidence, described as being 3 feet in length and three-quarters of an inch in diameter (Tr. 30).

[7]When cross-examined as to where appellant was aiming, the radio officer testified that "it had to be the Chief Mate because the Chief Mate was right in front of him, "and the third mate (whom he mistakenly identified as a second mate) "would have been out of range of the bar" (Tr. 51).

[8]The intended victim "may obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm." See Perkins, Criminal Law 115 (2nd Ed., 1969) and cases cited therein. Since this was the situation with respect to the chief mate, we see no purpose or necessity for calling him as a prosecuting witness. Nor do we find his testimony essential with respect to prior events covered by the third mate. Moreover, appellant made no effort to have the chief mate subpenaed to appear, although entitled to do so. 46 CFR 137.20-45. Thus, no reason appears for construing the chief mate's nonappearance to be

commission thereof.

Appellant's anger and hostility toward the chief mate while in the act of wielding the steel rod is manifested by the prior events and his subsequent threats. Moreover, the chief mate's prior use of force against him was justified, in our view, because of appellant's interference with ministrations to the incapacitated steward. The chief mate is also shown to have been the only person within striking distance of the rod in the direction of its swing. We hold that the rod constituted a dangerous weapon in appellant's hands,[9] by means of which he possessed sa then-present capability of causing serious, possibly fatal, injury to the chief mate, particularly since the latter was unaware of his action. Appellant's unlawful intent is inferred from his forcible use of the weapon,[10] established not only by the radio officer's testimony but also by the injury he received from the blow aimed at the chief mate. Although the actual intention is unknown, the law implies malice and unlawful intention where, as we have found in this case, it appears that the aggressor's action is "well calculated to inflict serious personal injury."[11]

Appellant is clearly responsible for the consequences of his unlawful action, which in this case culminated in injury to the radio officer. Therefore, we also find that the offense of assault and battery upon the radio officer was committed by him.[12]

Turning to appellant's contentions, we are not condoning the failure of the law judge to set forth and evaluate the testimonial evidence. Nevertheless, it clearly appears that he did not accord greater weight to the officers' prior statements as appellant urges, but rather that he recited them simply for convenience upon finding that, as to the witnesses. the statements "are substantially the same as the testimony they gave under oath, and they present a clear word picture of what transpired." On review, we also find that there was substantial similarity and that the

---

in appellant's favor.

[9]6 C.J.S., Assault and Battery, section 77c.

[10]Annotation: Assault with Dangerous Weapon--Intent. 92 ALR 2d 635.

[11]6 Am. Jur. 2d, Assault and Battery section 17. See People v. Peak (Cal., 1944) 153 P. 2d 464, cited therein.

[12]In addition to the citations of the Commandant, see cases cited in Perkins, supra note 8, at 129.

statements serve to corroborate the testimony given on direct examination and cross-examination.[13] Although each of them contains a complete version of the incident, thus including information supplied by the others as well as the individual's own recollection, it is obvious that the statements are to be read in that light. The limitations of the witnesses' testimony because of the interval separating their arrival at the scene and their different vantage points, were made readily apparent on direct examination. Yet, appellant made no use of the statements to challenge their credibility with respect to the inclusion of facts therein not based on first-hand knowledge, nor has he raised on appeal any instance therein of direct contradiction with their testimony.[14] We reject appellant's assertion, therefore, that the witnesses are discredited by the tenor of their prior statements.

In sum, having modified the decision of the law judge by stating additional reasons therefor, the Board nonetheless adopts his findings and conclusions. We agree in particular that the evidence of record leaves "little doubt that if the swing of the rod had not been intercepted by the radio officer thus allowing it to make contact with the chief mate, the latter would have been critically, if not fatally, wounded." We further agree that this act of violence necessitated the revocation action despite the absence of a prior record of misconduct. Appellant's violent nature, clearly demonstrated herein, would continually threaten the safety and well-being of others within the shipboard environment.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it is hereby denied; and

2. The order of the Commandant affirming the revocation of appellant's seaman's documents under authority of 46 U.S.C. 239(g) be and it hereby if affirmed.

REED, Chairman, McADAMS, BURGESS, and HALEY, Members of the

---

[13]We do not find that the logbook entry of August 12, 1970, was made in compliance with 46 U.S.C. 702, because this was long after the logging of the offense and appellant did not receive notification or the right of reply. Roeder vs. Alcoa Steamship Co. (3 Cir., 1970) 422 F. 2d 971. The attached statements were nonetheless admissible as hearsay evidence and entitled to a high degree of weight in assessing the trustworthiness of the testimonial evidence.

[14]See e.g., McCormick, Handbook of the Law of Evidence, section 34 (1954).

Board, concurred in the above opinion and order. THAYER, Member, was absent, not voting.

(SEAL)